Commissaire à l'information du Canada

Information Commissioner of Canada

Annual Report | 17/18

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June 2018

Senator George J. Furey
Speaker of the Senate
Ottawa ON K1A 0A4

Dear Mr. Speaker:

I have the honour to submit to Parliament, pursuant to section 38 of the *Access to Information Act*, the Annual Report of the Information Commissioner of Canada, covering the period from April 1, 2017, to March 31, 2018.

Yours sincerely,

Caroline Maynard
Information Commissioner of Canada

June 2018

The Honourable Geoff Regan, M.P.
Speaker of the House of Commons
Ottawa ON K1A 0A6

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I have the honour to submit to Parliament, pursuant to section 38 of the *Access to Information Act*, the Annual Report of the Information Commissioner of Canada, covering the period from April 1, 2017, to March 31, 2018.

Yours sincerely,

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MESSAGE FROM THE COMMISSIONER

— *Caroline Maynard*
Information Commissioner of Canada

> *" I am fortunate to work alongside a team of dedicated professionals who will support me in taking on this challenge."*

I was appointed Information Commissioner of Canada just as this reporting year was wrapping up, on March 1, 2018. As such, this report focuses on the work of my predecessor, but I would like to share some of my initial priorities as I begin my seven-year mandate.

This mandate begins with an inventory of nearly 3,500 complaints – that's a 23% increase from the previous year's inventory. Complaints to the Office of the Information Commissioner (OIC) have also continued to grow, with a 25% increase from last year. Canadians deserve timely access to information. My first priority is to work to address the inventory of complaints my office has yet to complete, while investigating new complaints as they arrive.

I am fortunate to work alongside a team of dedicated professionals who will support me in taking on this challenge.

I am working with staff to identify ways to resolve complaints in a timelier manner to alleviate the inventory of unassigned complaints and address delays. Over time, I hope to streamline the investigation process and improve operational efficiencies. I am optimistic about the opportunities ahead for access to information and government openness and transparency in Canada. I intend to work closely and collaboratively with institutions to share best practices and opportunities for improving access to information service delivery for Canadians. I plan to collaborate with the Privacy Commissioner of Canada and my Federal, Provincial, and Territorial Information and Privacy Commissioner counterparts to further access to information for Canadians.

I will also seek to inform government institutions and the public of my Office's interpretation of the Act for the sake of consistency in our approach to investigations. Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, will serve to further this goal, as the new legislation will allow the Information Commissioner to publish orders and recommendations from our investigations.

This annual report is the first step towards ensuring that consistency. I have selected for this report investigations, decisions from the court and other OIC activities from 2017–2018 that exemplify my Office's interpretation of the *Access to Information Act* and approach to openness, transparency and accountability.

Notable activities from 2017–2018 include investigations where the OIC was able to clarify its position when an institution refuses to confirm or deny whether a record exists; collaborative strategies with a number of institutions that led to timelier or more responsive access for Canadians; and a decision from the Federal Court of Appeal about raising different exemptions to prevent disclosure during court review than the exemptions that were raised during the Commissioner's investigation.

This report also marks the final chapter of former Information Commissioner Suzanne Legault's tenure. During her final year, she concluded the investigation into Canadian scientists and the media, hosted a Right to Know Conference on access to information as a human right, and presented the Grace-Pépin Access to Information Award to Darce Fardy, a former CBC journalist and former Review Officer for Nova Scotia. I join all Canadians in thanking Commissioner Legault for her commitment to the right of access, and for all the improvements she made to the access regime.

The torch has been passed, and I am honoured to protect and promote access to information rights as Information Commissioner of Canada.

Sincerely,

Caroline Maynard
Information Commissioner of Canada

RETROSPECTIVE ON THE TENURE OF FORMER INFORMATION COMMISSIONER

SUZANNE LEGAULT

Suzanne Legault completed her nine-year tenure as Information Commissioner of Canada on February 28, 2018.

Commissioner Legault and her team at the Office of the Information Commissioner conducted more than 15,000 investigations and argued several precedent-setting cases before several levels of court, including the Supreme Court of Canada.

Commissioner Legault was also an early champion of Open Government and encouraged the Government of Canada to get involved in the Open Government Partnership and adopt a made-in-Canada strategy towards openness and transparency. She appeared before a Canadian parliamentary committee in April 2010 on the topic of open government and proactive disclosure. Subsequently, in 2011, the government joined the Open Government Partnership and Canada is now a co-chair of its steering committee.

Commissioner Legault was a strong advocate for modernizing the *Access to Information Act*. In a March 2015 special report to Parliament, she made 85 recommendations for modernizing the Act, covering themes such as the institutions that the Act should apply to, the right of access, timeliness, proactive disclosure, and the Commissioner's oversight powers.

This report led to a study of the Act conducted by a House of Commons committee. The committee tabled a report in Parliament in June 2016 featuring 32 recommendations that closely aligned with Commissioner Legault's.

When the government tabled Bill C-58, *An Act to amend the Access to Information Act* and the *Privacy Act and to make consequential amendments to other Acts* in 2017, Commissioner Legault tabled a comprehensive response in Parliament to the Bill, offering recommendations for improvements to benefit Canadians.

Throughout her mandate, Suzanne Legault worked to enhance public understanding of the right of access by presenting at speaking engagements across Canada and the world, hosting and attending various access and transparency conferences, and appearing before numerous Parliamentary committees. She also collaborated with colleagues and advocates from across Canada and around the globe, working closely with her fellow Federal, Provincial, and Territorial Information and Privacy Commissioners on joint resolutions, and assisting various countries with their transparency initiatives.

Commissioner Legault will be remembered for her important contributions as an agent of Parliament and her tireless efforts to advance access rights on behalf of Canadians.

ABOUT THE OFFICE OF THE INFORMATION COMMISSIONER

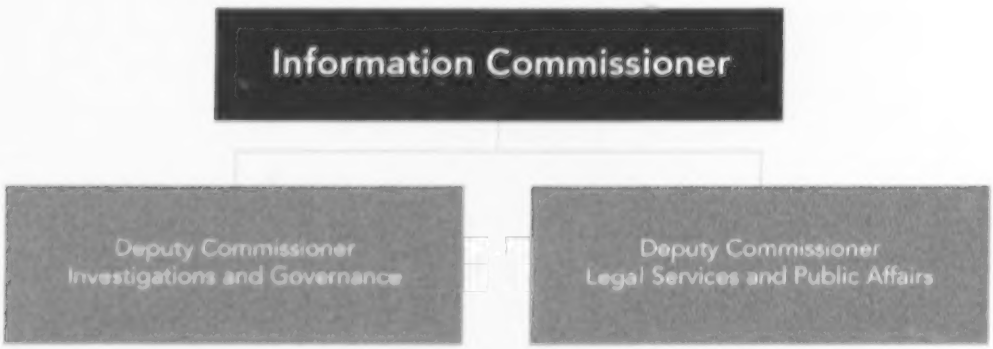
The Information Commissioner of Canada is an Agent of Parliament appointed by both houses of Parliament for a seven-year term under the *Access to Information Act*.

The Commissioner is the first level of independent review of government decisions relating to requests for access to public sector information. The Act requires the Commissioner to investigate all the complaints she receives. She is supported in her work by the Office of the Information Commissioner (OIC).

The OIC also supports the Commissioner in her advisory role to Parliament and parliamentary committees on all matters pertaining to access to information.

ORGANIZATIONAL STRUCTURE

The OIC's organizational structure is shown in the diagram below.



Complaints Resolution and Compliance mediates and investigates complaints about the processing of access to information requests and any issues related to requesting or obtaining access to records under the Act.

Legal Services provides legal advice on investigations and administrative and legislative matters, as well as training on recent case law. Legal Services also monitors legislative developments to determine their possible effect on the Commissioner's work and access to information in general. Legal Services represents the Commissioner in court as she seeks to clarify points of access law and uphold information rights.

Public Affairs conducts communications and external relations with a wide range of stakeholders, notably Parliament, governments and the media. Public Affairs also provides input to the Treasury Board of Canada Secretariat on improving the administration of the Act. Public Affairs is responsible for the OIC's access to information and privacy function.

Corporate Services provides strategic and corporate leadership for planning and reporting, human resources and financial management, security and administrative services, internal audit and evaluation, and information management and technology.

INVESTIGATION HIGHLIGHTS

The following examples of investigations closed in 2017–2018 provide insight into the OIC's interpretations of sections of the *Access to Information Act* that can sometimes be confusing to the public and challenging for institutions to administer.

By highlighting these investigations, it is hoped that the application of the Act will be improved in these areas and future complaints will be reduced.

SUBSECTION 10(2)

Refusal to Confirm or Deny Existence of Records

Subsection 10(2) of the Act allows an institution to neither confirm nor deny the existence of a record in response to an access request. This provision of the Act was designed to address situations in which the mere confirmation of a record's existence or non-existence would reveal information that should be protected under the Act.

APPROPRIATE DENIAL OF A RECORD'S EXISTENCE

One of the circumstances where subsection 10(2) can be reasonably used is when confirming whether a record exists could interfere with an investigation.

In 2017–2018, the OIC received several complaints from individuals who wanted to know whether CSIS had files on them. CSIS' mandate is to investigate the activities of individuals who threaten the national security of Canada. Confirmation from CSIS as to whether it has records related to an individual would indicate whether an investigation is currently taking place. Either response could be potentially injurious to CSIS' investigative work, so CSIS therefore applied subsection 10(2) in response to these requests.

In these circumstances, the OIC agreed that CSIS' response to neither confirm nor deny the existence of this kind of information was a reasonable use of subsection 10(2). This approach has recently been confirmed by the Federal Court.[1]

[1] *Vis v. Canada (Attorney General)*, 2018 FC 394.

INAPPROPRIATE DENIAL OF A RECORD'S EXISTENCE

In contrast, subsection 10(2) generally should not be applied when the existence or non-existence of records is already known.

For instance, Public Services and Procurement Canada (PSPC) refused to confirm or deny the existence of records related to a bid for an Integrated Analytics Solution, despite the fact that the information regarding the bid, including the bid number and the product or service being sought, had been posted on the Internet by PSPC.

Given these circumstances, the OIC did not agree that PSPC could refuse to confirm that it had responsive records.

PSPC accepted the OIC's interpretation of subsection 10(2) and released a significant amount of information to the requester. This resulted in the closure of another 103 related complaints against various institutions, an extremely positive result.

SECTION 18.1
Economic Interests of Certain Government Institutions

Section 18.1 states that a government institution may refuse to disclose a record requested under the Act in order to protect the economic interests of certain government institutions (the Canada Post Corporation, Export Development Canada, the Public Sector Investment Board, and VIA Rail Canada Inc.).

The OIC recently had the opportunity to review section 18.1 when it was asked to investigate VIA Rail's response to a request for passenger traffic, particularly regarding when and where passengers got on and off trains, over various years.

VIA Rail had not disclosed the information to the requester because it claimed doing so could jeopardize its competitive position.

The OIC was not convinced that the information at issue was detailed enough to cause this outcome. Factors that caused the OIC to reach this conclusion included the fact that VIA Rail's competitors could not, from the information at issue:

- determine VIA's profitability;
- offer alternative transportation services for better prices on VIA's busiest routes or on routes which had seen an increase in customers over the years;
- offer options or promotions to targeted customers at the right place or right time to gain a higher market share; or
- obtain favourable leases or tariffs at the conclusion of existing Railway Service Agreements.

VIA Rail accepted the OIC's analysis and has now changed its policy on disclosure of on-off traffic information so that this type of information will be released in its entirety in the future.

SECTION 20
Third Party Information

The Government of Canada collects a wide range of information from third parties. This information may be submitted voluntarily, such as in a bid for a government contract, or submitted as required by law, such as for proof of regulatory compliance. There is a compelling need to protect information that is provided to the government by third parties if the information meets one of the tests outlined in the exemption under section 20.

QUALIFYING THIRD PARTY INFORMATION

In 2017–2018, the OIC closed several investigations related to Health Canada's refusal to disclose the dates upon which various pharmaceutical companies' generic drugs had been examined and approved, also known as patent hold dates.

The OIC recommended that the patent hold dates should be disclosed. They did not qualify as commercial information, nor were they supplied by the third party, and therefore did not meet the tests under paragraph 20(1)(b). In addition, the claims of competitive harm were speculative and were not supported by detailed evidence, and therefore the test under paragraph 20(1)(c) could not be met.

Health Canada agreed with this recommendation and released the information. In keeping with its commitment to openness and transparency, Health Canada now discloses patent hold dates, following the issuance of a third party's Notice of Compliance, without requiring a formal access request.

EXCEPTIONS TO THE EXEMPTION FOR THIRD PARTY INFORMATION

Although the Act generally protects third party information, it allows this information to be disclosed in certain limited circumstances. One such circumstance is subsection 20(5), which allows third party information to be disclosed if the third party consents.

The Federal Court of Appeal recently determined that institutions should consider whether or not to disclose third party information under this subsection if there is a disclosure clause relating to the information in contractual instruments between a government institution and a third party.[2]

Another circumstance where third party information can be disclosed can be found in subsection 20(6) of the Act, which allows records that would otherwise qualify for protection under the third party exemption to be disclosed if there is a public interest in their disclosure related to public health, safety, or protection of the environment. Disclosure in the public interest must clearly outweigh the interest protected in the exemption.

If a complaint is made about the application of the third party exemption, the OIC will consider whether there is a public interest in disclosing the records, according to the criteria set out in subsection 20(6), and will recommend disclosure if this criteria is met.

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[2] *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135.

INFORMATION RELEVANT TO THE PUBLIC'S HEALTH AND SAFETY

A good example of the criteria in subsection 20(6) being appropriately met occurred when a requester asked for inspection reports of the Ste-Anne tunnel at St-Hyacinthe, Quebec.

The Ste-Anne tunnel faced various structural issues that were of concern to the residents of the area, such as the effects of water seepage and erosion. In addition, the tunnel is situated in close proximity to two large residences for long-term care and care for the elderly.

When the OIC was asked to review Transport Canada's response to this request, these factors were considered relevant to the public's health and safety, outweighing any third party interests, and therefore met the criteria for disclosure under subsection 20(6).

Transport Canada and the third party agreed with the OIC and the information was disclosed in its entirety.

INFORMATION THAT POSES A POTENTIAL RISK TO PUBLIC SAFETY AND TO THE THIRD PARTY

In other circumstances, the OIC will agree with an institution that the criteria for disclosing information in the public interest has not been met, and disclosure could even constitute a potential risk to public safety and to the third party.

For instance, a requester sought access to a document describing possible spill scenarios that were used to assess the risk of marine pollution and the design of a containment system at a third party oil refinery. While there was some public interest in disclosing this kind of information, releasing the specific technical details of the containment system could make the third party's facility vulnerable to anyone with potentially harmful intentions. The OIC therefore agreed that the potential risk to public safety was greater than the public's interest in obtaining the information.

Instead of releasing the specific information the requester wanted, the institution gave general information, as well as the third party's public statements about the containment measures. The OIC agreed this provided sufficient detail to satisfy the public interest in public health, safety and protection of the environment.

COLLABORATING WITH INSTITUTIONS

The OIC strives to collaborate with institutions to improve Canadians' access to information. 2017–2018 produced a number of examples where institutions and the OIC were able to work together to achieve better results for Canadians.

THE OIC INVESTIGATES TWO TYPES OF COMPLAINTS.

Administrative complaints generally relate to institutions extending or delaying timelines for responses to requesters.

Refusal complaints relate to institutions applying exemptions under the Act to refuse disclosure of information.

A SUCCESSFUL STRATEGY WITH THE RCMP TO ADDRESS ADMINISTRATIVE COMPLAINTS

Personnel and financial resources can greatly affect an institution's ability to respond to requests in a timely manner. For example, the RCMP's Access to Information and Privacy (ATIP) branch received 4,826 requests in 2016–2017, but did not have sufficient resources to respond efficiently to these incoming requests. This has resulted in an increase of access complaints against the RCMP.

The RCMP has consistently been amongst the top five institutions with the greatest number of complaints filed against it over the past five years. In 2017–2018, the OIC registered 435 complaints against the RCMP. Seventy-four percent of these were either time extension or delay complaints.

The increase in the number of administrative complaints was directly proportional to the increase in requests received by the RCMP and the number of requests that the RCMP did not respond to within the legislated timeframe of 30 days. The numbers of requests was overwhelming to the RCMP, and it did not have the resources to address the workload. The OIC has also experienced a growing backlog of RCMP administrative complaints as the Office struggled to assign complaints as they were received.

In January 2018, the OIC and the RCMP worked together to implement a strategy that would allow the RCMP to address its backlog of complaints in order to respond to requests in the timeliest manner possible. Investigators worked collaboratively with the RCMP to find the most efficient means to respond to the backlog and to the OIC's investigative requirements.

The results were extremely positive. Before the implementation of the strategy, between April and December 2017, the OIC concluded an average of five RCMP administrative complaints per month. After the implementation of the strategy, between January and the end of March 2018, the RCMP concluded and closed 142 requests and the OIC concluded and closed 136 administrative complaints.

The OIC continues to work with the RCMP to ensure timely and efficient access to information.

INAC ASSISTS WITH DIFFICULT SEARCH FOR A DOCUMENT

Subject matter experts within institutions can be an excellent source for tracking information related to access requests.

For example, an individual sought a copy of his birth certificate through an access request to Indigenous and Northern Affairs Canada (INAC) so that he could apply for his Old Age Security pension.

The individual was born in the United States, and the birth registration had been scanned and microfiched directly in the provincial archives, rather than the provincial vital statistics office. In addition, the registration had been filed under a district code rather than either a band or an agency, which is where the searches had been directed originally.

> *"I would like to thank you ever so much for your help with this. When I read your email, it did bring tears to my eyes, happiness... you are totally my hero."*
>
> *– Email from the requester to an OIC investigator after the birth registration was found*

A subject matter expert at INAC, with the help of an investigator at the OIC, undertook a complex and difficult search and ultimately located the document, which was released to the requester. The requester was very grateful for the efforts of both INAC and the OIC.

GOING THE EXTRA MILE TO PROVIDE INFORMATION

Institutions can frequently provide requesters with more information than originally requested in order to assist the requester's understanding.

For instance, a requester sought technical data relating to a civil aviation safety complaint from Transport Canada. This information was not held by Transport Canada; however, during the OIC's investigation, Transport Canada agreed to provide additional information to the requester that, while not responsive to the text of the request, could help the requester understand the context of the program. This additional information included a briefing note prepared for the Minister, which discussed the approval of the flight paths at issue in the safety complaint. The briefing note also included a customized letter that better explained Transport Canada's mandate, as well as those of other stakeholders in Canadian civil aviation safety.

ACCESS TO SCIENTISTS

During her mandate, a systemic investigation was undertaken by former Information Commissioner Suzanne Legault into a complaint submitted by the Environmental Law Clinic at the University of Victoria and Democracy Watch.

The complainants alleged that the *Communications Policy of the Government of Canada*, in combination with institution-specific media relations policies and practices, restricted government scientists from publicly communicating about their research. The complainants also alleged the right of access to information under the *Access to Information Act* was also impeded by the application of these policies.

Commissioner Legault's investigation concluded on February 28, 2018. Her investigation found that while the language of the Communications Policy and the various institutional media relations policies were consistent with access to information values and principles, they were not being applied as such in practice. In fact, as applied, the Communications Policy and various institutional media relations policies were impacting the federal access to information regime as a whole.

> More details on this investigation and its findings can be found in the annex under Detailed Summary: Access to Scientists.

COURT PROCEEDINGS

The Information Commissioner was involved in 23 legal proceedings in 2017–2018, eight of which resulted in decisions. Summarized below are cases of significance from the year.

TRANSFERRING REQUESTS AND THE DUTY TO ASSIST

In ongoing litigation currently before the Federal Court of Appeal,[3] the Commissioner is arguing that an institution does not need to have control over a record to have a duty to assist a requester in response to the request or to have an obligation to transfer a request to an institution that does have control of the record. This litigation is the first ever to interpret section 8, transfer of request, of the *Access to Information Act*.

INDIAN RESIDENTIAL SCHOOL SETTLEMENT AGREEMENT RECORDS

The Supreme Court of Canada (SCC) determined that records created for the purposes of independently adjudicating claims related to the Indian Residential School Settlement Agreement must be destroyed after a 15-year retention period.[4]

Arguments had been made before the SCC that these records should be preserved and accessible in accordance with federal legislation such as the *Access to Information Act*, *Privacy Act*, and *Library and Archives Canada Act*.

The SCC was satisfied that the survivors of residential schools and other contracting parties entered into the Settlement Agreement with the intent that information would be treated as highly confidential and that any archiving of the related documents required survivor consent. Therefore, these records can be destroyed.

LATE APPLICATION OF EXEMPTIONS MUST BE JUSTIFIED

The Federal Court of Appeal (FCA) has determined that the late application of exemptions to prevent the disclosure of information in response to an access request requires justification by an institution.[5] The FCA, however, declined to make a general ruling regarding whether exemptions that mandatorily require information to be withheld can be applied well after a response has been given to a requester and a complaint has been made to the Information Commissioner.

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[3] *Matthew Yeager v. Minister of Public Safety and Emergency Preparedness and Information Commissioner of Canada*, A-139-17.
[4] *Fontaine et al. v. Canada*, 2017 SCC 47, http://www.oic-ci.gc.ca/en/publications-reports/annual-report-2016-2017_6.aspx.
[5] *Defence Construction Canada v. Canada (Office of the Information Commissioner)*, 2017 FCA 133, http://www.oic-ci.gc.ca/en/publications-reports/annual-report-2016-2017_6.aspx.

This decision was a result of a request made to an institution where a mandatory exemption was applied to the records at issue after the Information Commissioner's investigation had concluded and court proceedings had commenced.

The FCA rejected the Federal Court's conclusion that the institution could not rely on the late-raised mandatory exemption to prevent disclosure. The FCA ordered that the matter be referred back to the Federal Court to receive evidence as to why the exemption was asserted late, and to re-determine the matter. The matter has subsequently been discontinued.

TEST FOR THE INFORMATION COMMISSIONER TO BE AN ADDED PARTY

The FCA has confirmed the test to add the Information Commissioner as a party during Court review of an access refusal under the *Access to Information Act*.[6] The test is: whether the Information Commissioner would be of assistance to the Court, with the criterion of assistance to be determined on a case-by-case basis.

The FCA rejected the argument that the test for adding the Information Commissioner as a party was whether the Commissioner is necessary to the litigation.[7]

PERSONAL IDENTIFYING INFORMATION ON SOCIAL MEDIA CAN BE CONSIDERED PUBLICLY AVAILABLE

The FCA has confirmed, in two similar cases, that personal identifying information that has been posted to social media, such as the details that can be found on a business card, can be considered publicly available. This information should therefore be disclosed to requesters under the exception to the exemption for personal information (paragraph 19(2)(b)).[8]

FACTS AND DECISIONS DO NOT QUALIFY FOR THE ADVICE AND RECOMMENDATIONS EXEMPTION

The Federal Court has confirmed that factual information appearing alongside advice and recommendations does not amount to advice or recommendations. In addition, decisions based on advice or recommendations do not constitute advice or recommendations. Neither facts nor decisions, therefore, qualify for the exemption for advice or recommendations (section 21).[9]

In this same decision, the Federal Court also had the opportunity to interpret the definition of "any discretionary benefit of a financial nature", which is an exception to the definition of personal information (subsection 3(1) of the *Privacy Act*). The Court determined that the relevant criteria was whether 1) the information was related to a financial benefit; and 2) the granting of the benefit was discretionary. In this instance, the Court found the information met the criteria and therefore could not be exempted as personal information.

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[6] *Apotex Inc. v. Canada (Health)*, 2017 FCA 160, http://oic.ci.gc.ca/eng/rapport-annuel-annual-report_2016-2017_4.aspx
[7] This test comes from Rule 104 of the Federal Courts Rules.
[8] *Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2018 FCA 10 http://oic.ci.gc.ca/eng/rapport-annuel-annual-report_2016-2017_4.aspx
[9] *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2017 FC 827, http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2016-2017_4.aspx

ADVISING PARLIAMENT

Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and make consequential amendments to other Acts*

On June 19, 2017, the government tabled Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts.*[10] This bill contains the government's first phase of reforms to revitalize the *Access to Information Act*.

The Standing Committee on Access to Information, Privacy and Ethics (ETHI) began its study of Bill C-58 on October 18, 2017.

Former Information Commissioner Suzanne Legault appeared before ETHI on November 1, 2017 to discuss her concerns with Bill C-58. During this appearance, she proposed several recommendations to improve Bill C-58,[11] as outlined in her special report, *Failing to Strike the Right Balance for Transparency.*[12]

ETHI tabled a report to Parliament proposing several amendments to Bill C-58.[13] The House of Commons supported ETHI's amendments, and Bill C-58 passed Third Reading as amended in the House on December 6, 2017.

Bill C-58 was introduced in the Senate on December 7, 2017 and was at Second Reading as of March 31, 2018.

INFORMATION COMMISSIONER CAROLINE MAYNARD'S VIEWS ON BILL C-58

Commissioner Maynard has studied Bill C-58. During her nomination appearances, she raised concerns with some aspects of the bill that might limit or delay access. She also noted that there are some encouraging aspects to the bill.[14]

Should the opportunity arise, she will be ready to appear before the Senate committee tasked with studying Bill C-58 to elaborate her views.

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[10] Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*,
[11] ETHI Meeting, November 2017,
[12] Failing to Strike the Right Balance for Transparency, September 2017,
[13] ETHI Study Bill C-58,
[14] Senate, Caroline Maynard received in the Committee of the Whole, February 26, 2018,

MAIN AND SUPPLEMENTARY ESTIMATES

Commissioner Legault appeared before ETHI to discuss the Main Estimates 2017–2018 on May 4, 2017.[15] Layla Michaud, Deputy Commissioner of Investigations and Governance, appeared before ETHI on the Supplementary Estimates (B) 2017–2018 on November 29, 2017.[16]

BILL C-71, *AN ACT TO AMEND CERTAIN ACTS AND REGULATIONS IN RELATION TO FIREARMS*

Bill C-71, *An Act to amend certain Acts and Regulations in relation to firearms*, was introduced in the House of Commons on March 20, 2018. Bill C-71 is significant to the Office of the Information Commissioner (OIC) because it contains provisions that repeal retrospective amendments to the *Ending the Long-gun Registry Act* (ELRA), amongst other relevant provisions. The OIC is currently involved in litigation related to the constitutionality of the retrospective elements of the ELRA.[17]

Bill C-71 passed second reading in the House of Commons on March 28, 2018 and was referred to the Standing Committee on Public Safety and National Security.

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[15] Remarks from the Information Commissioner of Canada, Main Estimates, May 2017, http://www.oic-ci.gc.ca/eng/media-room-salle-de-presse_speeches-discours_2017_2.aspx
[16] ETHI Committee Meeting, Evidence, November 2017, http://www.ourcommons.ca/Committees/en/ETHI/StudyActivity?studyActivityId=9
[17] *Information Commissioner of Canada and Bill Clennett v. Attorney General of Canada*, (OSCJ-15-64736) and *Information Commissioner of Canada v. Minister of Public Safety and Emergency Preparedness*, (T-785-15). This litigation is currently suspended while negotiations between the parties are ongoing.

PROTECTING AND PROMOTING ACCESS

The Office of the Information Commissioner (OIC) protects and promotes access to information rights in a number of ways.

The following is a summary of the outreach initiatives conducted during the last year of former Information Commissioner Suzanne Legault's mandate.

RIGHT TO KNOW CONFERENCE

To celebrate Right to Know Week, former Information Commissioner Suzanne Legault hosted a conference in Ottawa on Right to Know Day, September 26, 2017. The theme of the conference was "Access to Information: A Fundamental Human Right".

The conference featured two panels, one on access to information and human rights, and another on Bill C-58. The keynote speaker was Laura Neuman, director of the Global Access to Information Program at the Carter Center.

The conference provided an opportunity for experts to discuss access to information as the foundation for other rights, such as women's rights, victims' rights, and Indigenous rights. The conference also gathered a diverse panel to discuss Bill C-58, An *Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts.*[18]

2017 Grace-Pépin Award Recipient

The 2017 Grace-Pépin Access to Information Award was awarded to Darce Fardy during the Right to Know Conference.

For six decades, Mr. Fardy was a dedicated advocate for access to information.In his 43-year career at the Canadian Broadcasting Corporation, he shone a light on government activities.

He went on to become the first full-time Information and Privacy Review Officer of Nova Scotia. In his 10-year career as Review Officer, he wrote 150 reports, travelled the province to promote the right of access, and supported the work of coordinators by providing them with ongoing training.

Mr. Fardy then founded the Nova Scotia Right to Know Coalition, where he helped users make access requests and continued to promote access rights.

[18] Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, http://www.parl.ca/DocumentViewer/en/42-1/bill/C-58/first-reading

COLLABORATING WITH INTERNATIONAL, FEDERAL, PROVINCIAL AND TERRITORIAL COMMISSIONERS

International Conference of Information Commissioners

Information Commissioners and Deputy Information Commissioners from 39 jurisdictions met in Manchester, UK on September 21, 2017 for the 10th International Conference of Information Commissioners. Elizabeth Denham, UK Information Commissioner and Margaret Keyse, Acting Scottish Information Commissioner, hosted the conference.

At the close of the conference, the attending commissioners signed a joint resolution regarding the right of access to information and accountability of public services.[19] The signatories resolved to:

- where appropriate to their own national setting, encourage initiatives and programmes to improve access to information legislation in relation to contracted out services and service delivered by non-public organisations;
- promote global initiatives that provide standards for open contracting;
- set up a conference working group to share practice on initiatives that seek to improve access to information in relation to the delivery of public services by non-public organisations, reporting back to the 11th conference in 2019.

WORLD BANK REGIONAL RIGHT TO INFORMATION WORKSHOP

Commissioner Legault attended a World Bank Regional Right to Information Workshop in Bangkok, Thailand from October 3 to 4, 2017 alongside information commissioners from a number of countries, most of whom represented countries in Southeast Asia. While there, she and her commissioner colleagues shared best practices and lessons learned.

Commissioner Legault provided the Canadian access to information perspective on two panels, one entitled "Assessing the Working of Information Commissioners", and a second entitled "Access, Privacy and Data Protection".

MEETING OF THE FEDERAL, PROVINCIAL AND TERRITORIAL INFORMATION AND PRIVACY COMMISSIONERS

All Federal, Provincial and Territorial Information and Privacy Commissioners (IPCs) across Canada met in Iqaluit, Nunavut for their annual meeting from October 17 to 18, 2017.

During the two-day conference, the commissioners discussed issues surrounding solicitor client-privilege, and exchanged ideas and best practices on access to information and protection of privacy legislation reform, government data integration, and self-governing First Nations.

At the end of the conference, Canada's IPCs issued a joint resolution on solicitor-client privilege, entitled "Safeguarding Independent Review of Solicitor-client privilege Claims".[20] This joint resolution calls on governments to ensure that access to information and privacy legislation in every jurisdiction empowers IPCs to compel the production of records over which solicitor-client privilege has been

[19] Right of access to information and accountability of public services, http://www.[illegible].ca/wp-content/uploads/2017/09/[illegible]-2017-1.pdf
[20] Safeguarding Independent Review of Solicitor-client Privilege, http://www.[illegible].ca/wp-content/uploads/2013/2017-1.pdf

claimed by public bodies to verify whether these claims are properly asserted when responding to requests for access to information.

VISIT FROM REPRESENTATIVES OF THE SOUTH AFRICAN INFORMATION REGULATOR

Commissioner Legault welcomed representatives from South Africa's Information Regulator (the Regulator) to the OIC on January 24, 2018.

The Regulator is a newly created office in South Africa tasked with monitoring and enforcing compliance among public and private bodies with South Africa's access to information and privacy protection laws.

Commissioner Legault and staff at the OIC shared best practices and policies to help the Regulator with its newly acquired mandate.

THE CARTER CENTER'S INTERNATIONAL CONFERENCE ON WOMEN AND ACCESS TO INFORMATION

Commissioner Legault attended an international conference hosted by the Carter Center on women and access to information entitled, "Inform Women, Transform Lives" from February 14 to 15, 2018.

The purpose of the conference was to identify and develop concrete recommendations to ensure the right to information, which benefits accountability, economic empowerment, and the promotion and protection of other rights, is equitably accessed by all. Commissioner Legault facilitated a working group dedicated to finding opportunities to integrate access to information for women into international conventions and instruments.

A resolution from the Carter Center on access to information and women is in development based on the work of this conference.

ANNEXES

DETAILED SUMMARY: ACCESS TO SCIENTISTS

On March 27, 2013, former Information Commissioner Suzanne Legault commenced a systemic investigation into a complaint submitted by the Environmental Law Clinic at the University of Victoria and Democracy Watch. This investigation concluded on February 28, 2018.

Complaint

The complainants alleged that the Communications Policy of the Government of Canada, in combination with institution-specific media relations policies and practices, restricted government scientists from publicly communicating about their research. The complainants also alleged the right of access to information under the *Access to Information Act* was also impeded by the application of these policies.

The investigation focused on the actions of Environment Canada, the Department of Fisheries and Oceans, Natural Resources Canada, the Canadian Food Inspection Agency, and the National Research Council of Canada (collectively the "subject institutions") during 2002 to 2014.

Treasury Board Secretariat (TBS) was incorporated into the investigation from the beginning given its role in overseeing both the Communications Policy and the administration of the federal access to information regime.

Investigation

The complainants' allegations regarding the Communications Policy were evaluated, as well as the media relations policies of each of the subject institutions, to assess if these policies, or their application, impeded access to information rights. The application of these policies was also examined to see whether it contributed to an increase in the number of access to information requests as a means of obtaining information.

Findings

Commissioner Legault made the following findings:

1. As written, the language of the Communications Policy has not been significantly changed during the period under investigation and is consistent with access to information values and principles.
2. As written, the language of the various departmental media relations policies reviewed as part of the OIC's investigation is also consistent with access to information values and principles.
3. In practice, the Communications Policy and the departmental media relations policies were not being applied by the subject institutions during the period under investigation in keeping with the stated objective of responding to the information needs of the public.
4. As applied during the period under investigation, the Communication Policy and the departmental media relations policies are impacting upon the federal access to information regime.
5. The fear observed by the OIC on the part of public servant investigation participants is consistent with the "chill" documented in the survey of over 4,000 federal government scientists conducted by the Professional Institute of the Public Service of Canada and reviewed by the OIC as part of this investigation.
6. The application of the Communications Policy and the departmental media relations policies during the period under investigation is not consistent with the Government of Canada's formal commitments to foster and promote Open Government.

Additional Representations since the October 2015 Election

Commissioner Legault sought and obtained from TBS and the subject institutions a comprehensive list of the initiatives undertaken since the October 19, 2015 election that related to the subject matter of this systemic investigation. Following her review of these measures, on September 18, 2017, Commissioner Legault made several recommendations to the President of the Treasury Board to further enhance the government's response to the concerns raised by the systemic investigation.

RECOMMENDATIONS MADE TO THE PRESIDENT OF THE TREASURY BOARD BY COMMISSIONER LEGAULT

1. The government should ensure the Chief Science Advisor is independent from the executive and confer on this position the mandate to ensure that government science is fully available to the public and that government scientists are able to speak freely about their work.
2. Government institutions should be required to collect data related to the release of scientific information to the public, including in response to requests by members of the media.
3. The *Access to Information Act* should be amended to require heads of government institutions to make proactive public interest disclosure in relation to information that could affect public safety, public health or environmental protection.
4. To protect and support the right of public servants to speak publicly about their subject-matter expertise without fear of reprisal, TBS should:

- provide training to public servants on their rights and obligations in publicly communicating science-related information;
- identify best practices with respect to the disclosure of scientific information;
- identify and correct any weaknesses in the protections and supports provided to public servants in exercising these rights; and
- evaluate public servants' confidence in their ability to speak publicly about their subject-matter expertise.

GOVERNMENT RESPONSE TO COMMISSIONER LEGAULT'S RECOMMENDATIONS

In a letter dated October 24, 2017, the President of the Treasury Board, The Honourable Scott Brison, provided comments on each of the Commissioner's four recommendations and outlined steps taken by the government toward making federal science more accessible to the public and empowering federal scientists to speak freely about their work.

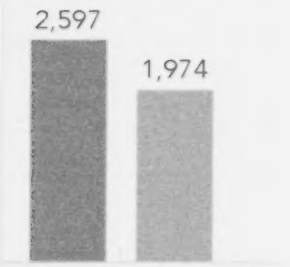
Minister Brison noted, for example, that one of the key elements of Chief Science Advisor of Canada Dr. Mona Nemer's mandate includes providing timely advice on the development and implementation of guidelines that aim to make government science fully available to the public and that aim to ensure that government scientists are able to speak freely about their work.

Minister Brison also noted that key science institutions were already voluntarily collecting data related to the release of scientific information to the public, pointing specifically to the work of Environment and Climate Change Canada and Natural Resources Canada in tracking media relations calls, social media metrics, contribution to peer reviewed articles, and participation in the Open by Default project.

FACTS AND FIGURES

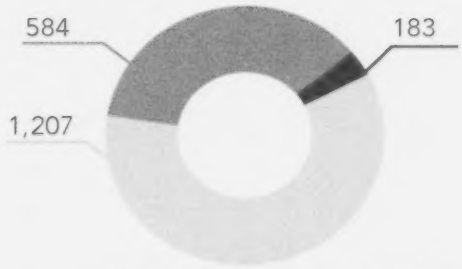
Provided are detailed statistical information related to the complaints the Office of the Information Commissioner received and closed in 2017–2018.

Received vs. complaints closed: 2017-2018



- 2,597 complaints received
- 1,974 complaints closed

Disposition of complaints closed: 2017-2018



- 584 complaints were well-founded
- 183 complaints were not well-founded
- The remainder of the closed complaints were discontinued, settled or resolved

EXPLANATION OF TERMINOLOGY

Complaints completed with findings

Well-founded The OIC found evidence of the complainant's rights being denied under the *Access to Information Act*.

Well-founded, resolved The institution took remedial action to the satisfaction of the OIC during the course of the investigation.

Well-founded, resolved with recommendations If the head of the institution accepted the OIC recommendations and remedial action was taken by the institution to the satisfaction of the OIC, the matter is considered resolved and no further action by the OIC is necessary.

Well-founded, not resolved If the head of the institution did not accept the recommendations of the OIC, or if the remedial action was not to the satisfaction of the OIC, the complainant will be informed that the matter is not resolved and the complainant, or the OIC with the complainant's consent, can pursue the matter in Court.

Not well-founded As a result of the investigation, the OIC found that the institution applied the *Access to Information Act* correctly.

Discontinued The complaint was withdrawn or abandoned by the complainant before allegations were fully investigated. In some cases, the complainant did not respond to the OIC's request for representations within a reasonable time period, or cannot be located.

Settled The complaint was settled to the satisfaction of all parties without the need for the OIC to make a finding.

Resolved For cases of deemed refusal (delay) and extension complaints where the final response to the requester has been sent during the initial stages of the investigation.

SUMMARY OF CASELOAD, 2013–2014 TO 2017–2018

In 2017–2018, the Commissioner received 2,598 new complaints and closed 1,974. There are 3,489 complaints in the inventory as of March 31, 2018.

	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
Complaints carried over from the previous year	1,798	2,091	2,244	3,010	2,865
New complaints received	2,069	1,738	2,036	2,077	2,597
New Commissioner-initiated complaints*	12	11	11	2	1
Total new complaints	**2,081**	**1,749**	**2,047**	**2,079**	**2,598**
Complaints discontinued during the year	551	407	353	828	554
Complaints settled during the year	193	276	71	101	20
Complaints resolved during the year*	-	-	67	467	633
Complaints completed during the year with findings	1,044	913	790	849	767
Total complaints closed during the year	**1,788**	**1,596**	**1,281**	**2,245**	**1,974**
Total inventory at year-end	**2,091**	**2,244**	**3,010**	**2,844**	**3,489**
Total new written inquiries***	248	431	448	468	516
Total written inquires closed during the year	236	235	633	426	551

*The Commissioner may launch a complaint under subsection 30(3) of the *Access to Information Act*.

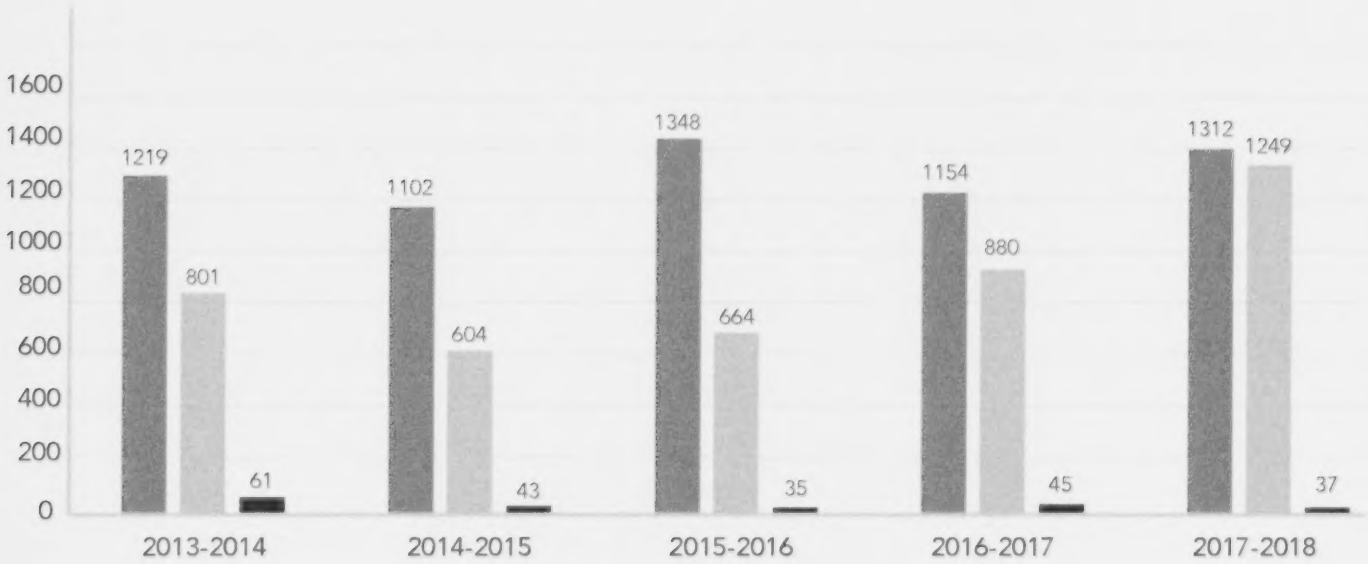
**The Commissioner introduced the "resolved" finding in March 2016. The Commissioner uses it when institutions send their final response to requesters during the initial stages of investigations into deemed refusal (delay) and extension complaints.

***Written inquiries are correspondence the Office of the Information Commissioner (OIC) receives that may result in new complaints under the *Access to Information Act*. For example, the OIC must determine whether the matter falls within the Commissioner's jurisdiction before opening a complaint file. Even when a written inquiry does not become a complaint, the OIC must send a response. The OIC began tracking written inquiries in 2011–2012.

NEW COMPLAINTS, 2013–2014 TO 2017–2018

In 2017–2018, the Commissioner received 1,312 refusal complaints, commonly because the institution concluded no records were available or exemptions were used to decline the disclosure of certain records. A total of 1,249 administrative complaints were also received, about delays, time extensions and fees. Additionally, 37 Cabinet confidence exclusion complaints were received by the OIC.

Administrative complaints represented 48 percent of new complaints, and the remaining 52 percent of complaints were either refusals or Cabinet confidence exclusion complaints.



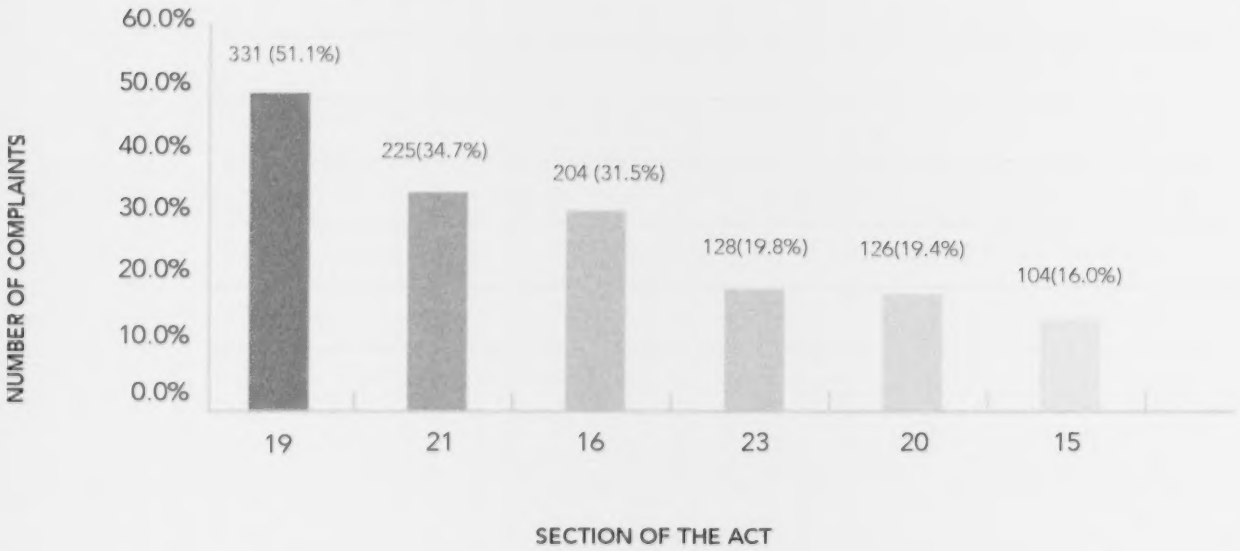
REFUSAL COMPLAINTS

ADMINISTRATIVE COMPLAINTS

CABINET CONFIDENCE EXCLUSION COMPLAINTS

COMMONLY CITED EXEMPTIONS IN REFUSAL COMPLAINTS, 2017–2018

The most commonly cited exemption in refusal complaints in 2017–2018 was section 19. This exemption provides that institutions shall refuse to disclose information containing personal information as defined in section 3 of the *Privacy Act*.[21]



Note: The sum of all percentages may exceed 100 percent, because a single complaint may involve multiple exemptions.

[21]Privacy Act, http://laws-lois.justice.gc.ca/PDF/P-21.pdf

NEW COMPLAINTS BY INSTITUTION, 2013–2014 TO 2017-2018

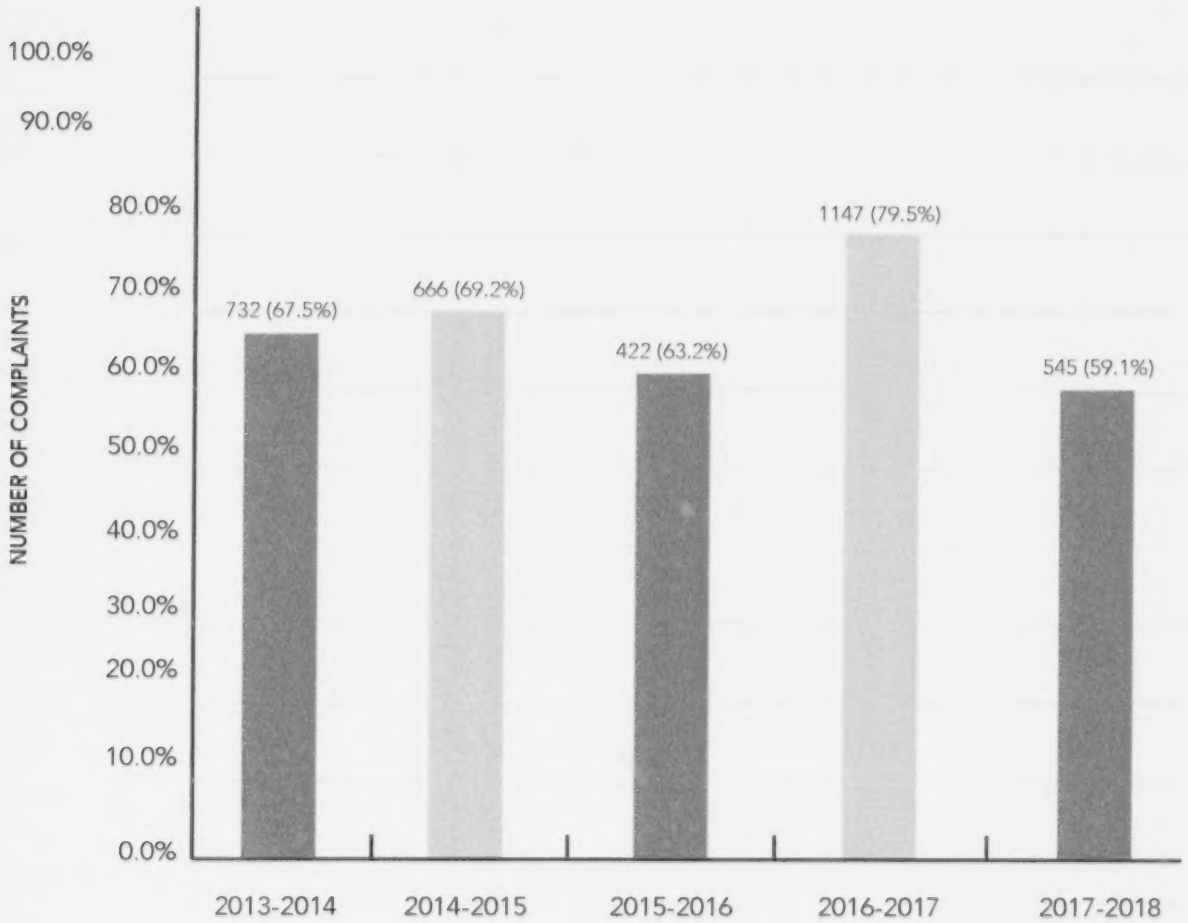
The chart above shows the 20 institutions that were the subject of the most complaints in 2017–2018. Many institutions appear on this list from year to year.

	2013-2014	2014–2015	2015–2016	2016–2017	2017–2018
Royal Canadian Mounted Police	185	178	235	274	435
Immigration, Refugees and Citizenship Canada	305	246	181	127	227
Canada Revenue Agency	283	221	271	367	213
National Defence	119	117	93	121	175
Parks Canada	9	12	20	4	147
Canada Border Services Agency	106	78	161	153	137
Privy Council Office	48	54	50	82	110
Global Affairs Canada	120	83	86	44	88
Health Canada	48	65	32	60	83
National Energy Board	14	1	14	16	79
Public Service and Procurement Canada	28	26	78	43	78
Correctional Service Canada	56	33	59	52	73
Department of Justice Canada	51	44	44	49	61
Transport Canada	83	87	57	81	53
Department of Finance Canada	19	12	17	35	50
Innovation, Science and Economic Development Canada	42	11	3	19	50
Canadian Broadcasting Corporation	61	37	25	12	48
Environment and Climate Change Canada	29	26	35	35	41
Employment and Social Development Canada	37	33	38	23	40
Indigenous and Northern Affairs Canada	60	23	31	47	38
Others (number of institutions)	451 (66)	342 (65)	486 (65)	372 (69)	372 (64)
Total	**2,081**	**1,749**	**2,047**	**2,079**	**2,598**

TURNAROUND TIMES FOR INVESTIGATIONS, 2013-2014 TO 2017-2018

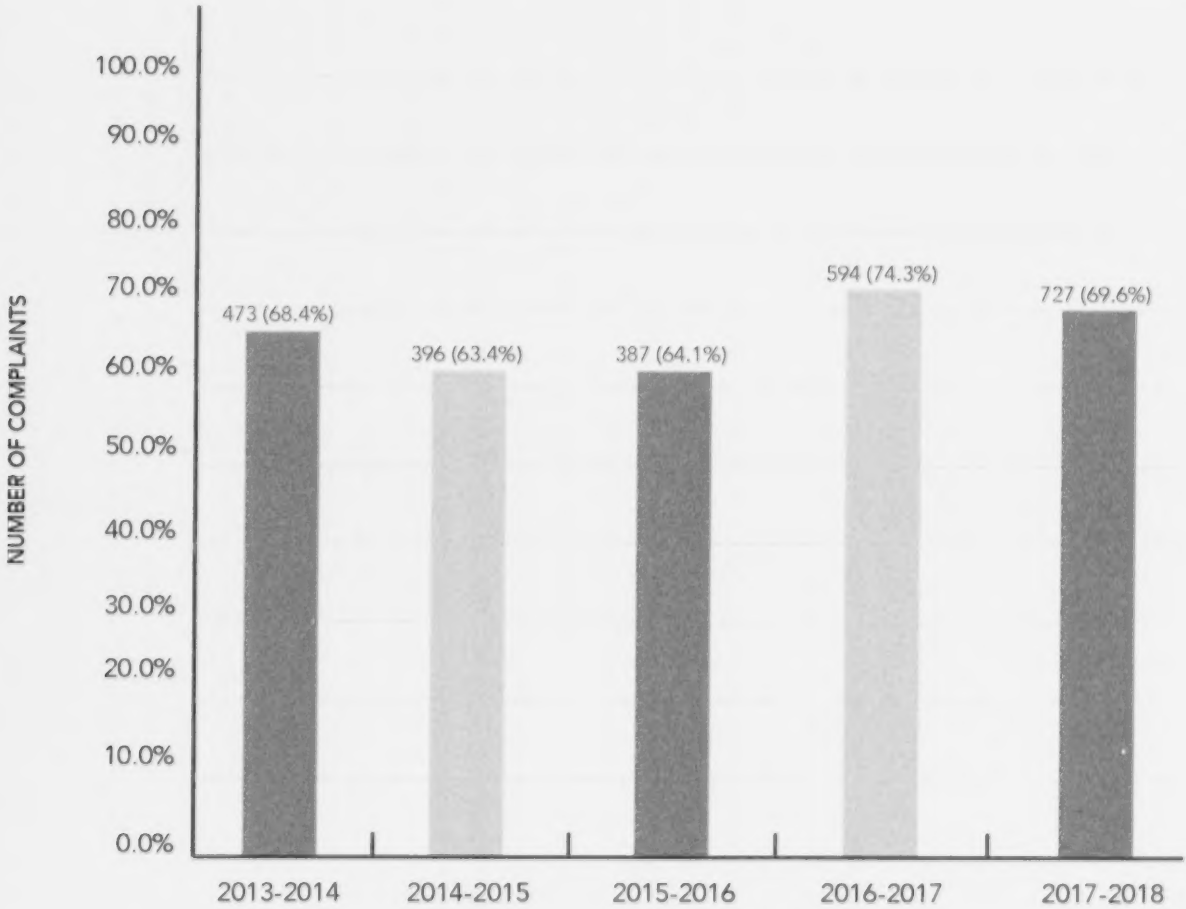
Refusal complaints closed within nine months

In 2017-2018, the Commissioner closed 59.1 percent of refusal complaints within nine months of their being assigned to an investigator. The median turnaround time, measuring from the date of assignment, was 203 days. This is an increase of 133 days from 2016–2017. There is a delay of 128 days (median) before a refusal file can be assigned to an investigator.



Administrative complaints closed within 90 days

In 2017–2018, the Commissioner closed 69.6 percent of administrative complaints within 90 days of their being assigned to an investigator. The median turnaround time, measuring from the date of assignment, was 39 days. This is an increase of 3 days from 2016–2017. There is a delay of 28 days (median) before an administrative file can be assigned to an investigator.



Complaints closed by institution, 2017–2018

This chart lists the 20 institutions under which the Commissioner closed the most complaints in 2017-2018.

	Overall	With merit	Not well founded	Resolved	Settled	Discontinued
Royal Canadian Mounted Police	332	80	18	147	1	86
Canada Revenue Agency	202	61	26	60	0	55
Immigration, Refugees and Citizenship Canada	183	23	13	110	1	36
National Defence	157	48	17	58	1	33
Canada Border Services Agency	109	38	11	40	0	20
Public Services and Procurement Canada	95	17	5	16	0	57
Transport Canada	92	28	3	9	3	49
Health Canada	71	37	1	23	0	10
Correctional Service Canada	62	35	4	20	0	3
Environment and Climate Change Canada	50	15	5	19	1	10
Global Affairs Canada	46	7	3	5	1	30
Privy Council Office	45	16	7	10	0	12
National Energy Board	41	9	0	22	0	10
Department of Justice	31	14	5	7	0	5
Innovation, Science and Economic Development Canada	29	16	0	9	1	3
Employment and Social Development Canada	27	8	0	11	2	6
Financial Transaction and Reports Analysis Centre of Canada	26	0	0	0	0	26
Department of Finance Canada	25	3	9	7	2	4
Canadian Broadcasting Corporation	23	12	9	2	0	0
Natural Resources Canada	22	4	8	7	0	3
Canadian Security Intelligence Service	22	2	5	1	0	14
Others (65 institutions)	284	111	34	50	7	82
Total	**1,974**	**584**	**183**	**633**	**20**	**554**

REPORT OF THE INFORMATION COMMISSIONER AD HOC FOR 2017-18

It is my pleasure to report here on the activities of the Office of the Information Commissioner, Ad Hoc. On April 1, 2007, the Office of the Information Commissioner (OIC) became subject to the *Access to Information Act (Act)*. This means that an access to information request can be made to the OIC as an institution to which the right of access to information applies.

The law that brought this about did not, however, create a mechanism separate from the OIC, which oversees government compliance with access requests, to investigate any complaints that access requests to the OIC have not been handled as the Act requires. Since it is a fundamental principle of access to information law that decisions on the disclosure of government information should be reviewed independently, the office of an independent Information Commissioner Ad Hoc was created and given the authority to investigate any such complaints about the OIC.

More specifically, pursuant to subsection 59(1) of the Act, the Information Commissioner has authorized me, as Information Commissioner, *Ad Hoc:*

> *...to exercise or perform all of the powers, duties and functions of the Information Commissioner set out in the Access to Information Act, including sections 30 to 37 and section 42 inclusive of the Access to Information Act, for the purpose of receiving and independently investigating any complaint described in section 30 of the Access to Information Act arising in response to access requests made in accordance with the Act to the Office of the Information Commissioner of Canada.*

Outstanding complaints from previous year

Our office had no outstanding complaints from the previous year.

New complaints this year

Only one complaint was received this year. This complaint was investigated and disposed of by the end of the fiscal year.

The central issue in the complaint concerned the proper application of paragraph 16.1(1)(c) of the Act. This provision exempts from production information obtained or created in the course of an investigation by the OIC. Once the investigation and all related proceedings are finally concluded, however, the exemption is partially lifted. At that point, the exemption no longer applies to documents created during the investigation. Our investigation revealed that the disputed documents had been obtained during the course of the OIC's own investigations. I therefore found that the OIC properly applied the mandatory exemption in refusing to disclose the requested documents.

In addition to this one complaint, this Office also received correspondence from a number of individuals who were dissatisfied with how the OIC had investigated their complaints and what they described as the OIC's delay in issuing findings regarding their complaints. This Office does not have jurisdiction to investigate concerns about how the OIC has investigated complaints made to it as the oversight body under the Act. Nor can my Office investigate concerns about delay by the OIC in processing such complaints. My mandate is limited to receiving and investigating complaints that an access request for a record under the control of the OIC itself may have been improperly handled.

Conclusion

The existence of an independent Information Commissioner, Ad Hoc, helps to ensure the integrity of the OIC's handling of access requests made to it, as an institution, and therefore contributes to the overall system of access to information at the federal level. My Office looks forward to continuing to play this part in access to information.

David Loukidelis QC
Commissioner, Ad Hoc, for the
Office of the Information Commissioner of Canada

March 2018